DE VENTRE INSPICIENDO:

for well cases have cited out of y^e Civil & Canon law

OR,

REMARKS

ON

Mr. ASHTON's ANSWERER

In a LETTER to a Friend.

Dear SIR,

IN Compliance with your Commands, obliging me to give you my Thoughts upon what the Answerer of Mr. *Ashton*'s Speech has said in Relation to the Civil and Common Laws, which he has been pleas'd to produce (as he thinks, conducing to his purpose) you receive this. You very well observe that this Answer has prevailed with many (especially those whose Education has not enabled them to examine his Quotations) to entertain Opinions that we were very hardly dealt with, as to the Affair of the Prince of *Wales*, contrary both to the *Laws of Nations*, *Civil* and *Old Common Law of England*. All that I have to alledg in the matter, is, that the Civil Law never made Provision in such a Case as the Prince of *Wales* happens to be; because unreasonable, as I shall demonstrate in this following Letter: And as for his Old Common Law, I'll appeal to all the unprejudic'd World, if it reaches the business he brought it in for. His Laws of Nations I shall not concern my self in, both as 'tis not injoin'd me by you, and likewise because 'tis too abstruse; but it will be I think, sufficient for me to prove, he prevaricates with the Laws (I mean Civil and Common) which the generality of our English World are better acquainted with, and so leave you to judge of the sincerity of the Person: For 'till he convinces me that it is a Law of Nations for every Prince to prove (when the next presumed Heir does or does not demand it) That the Child, he is satisfied, was Born of his Wife, be truly so; though such a thing might happen when she was perhaps at Prayers in her Closet, *&c.* I say, till he proves this to be usual amongst all Nations; For as *Justinian* (who I think, understood the Law of Nations as well as this Gentleman) defines the Laws of Nations to be, it is, *Quo jure omnes Gentes utuntur*, I believe I may very well forbear any thing of that matter. It will not be unnecessary, if I hint that the freedom I use is caused chiefly by the Security a private Letter ought to carry with it, which I suppose, will sufficiently admonish you of the Caution and Circumspection you are to use in Exposing it. Instit. lib. 1. Tit. 2. Sect. 1.

First then, he Asserts that *the Civil Law upon any Occasion of Suspicion* (observe the word of Latitude, *ANY OCCASION*, &c.) *Did Order that Notice be given twice a Week to the Parties concerned*;

concerned; *that they may receive full satisfaction*; *that the Mother is to be kept in an House by it self*, &c. As in the Answer to the Speech; and all this *upon any Occasion of Suspicion*. In Answer to which, I reply, what the Civil Law mentions in Relation to Spurious Issues, or Supposititious Births, may be reduced to a very narrow Compass, without leaving any thing material unsaid. *The Sanatus Consultum Plancianum* (of which Digest. *Lib*. 25. *Tit*. 3. *de. Agnoscendis & Alendis Liberis*) contains two Cases; of which the first *Commands that a Woman Divorsed from her Husband, shall within thirty days after this Divorse give Notice to her Husband, if she be with Child, that he may take care of, and make provision for it*; *or that the Husband deny the Wife to be so with Child by him*; *which if he does not do, he is obliged to take care of, and Educate the Child that shall be Born of her*. The second is, *That those Women who after a Divorse, feign a false Birth, render themselves Obnoxious and Punishable*; as the Law in such Cases has provided: Of which see *Cod. Lib*. 9. *Tit*. 22. *Ad Legem Corneliam de falsis*. Which was then Capital, but was afterwards moderated by the Emperor *Leo*. *Novel*. 77.

But in the Time of *Marcus Antoninus* and *Verus* Emperors, there happen'd two New Cases; and by consequence, requir'd a new Remedy; the first was of a Woman Divorsed from her Husband, who denied she was big with Child by him; the Husband Asserted she was: upon which (the Man earnestly desiring an Heir to his Family) the Emperors wrote to *Valerius Priscianus* the *Prætor* of the City, *That it seem'd most fit to them upon the Husband's Request, that three Midwives should be sent to this Woman and inspect her Body*, &c. Of which Digest. 25. *Tit*. 4. *Ventre inspiciendo*. The other Case was, of a Woman, who after the Death of her Husband affirm'd her self with Child; upon which the *Prætor* Commanded, *That, that Woman who, after the Death of her Husband, Asserted her self to be with Child, should give Notice twice a Month to them, to whom this matter did appertain*, viz. The next Heirs at Law; that satisfaction might be given them, *&c*. As in the Answer p. 13. From hence, Sir, I think you may plainly discern the disingenuity of this Answerer. For I appeal to you, and profess I would to all Mankind if the forementioned Cases (and yet they are those he refers us to; and I Challenge him to give me any other in Civil Law, any ways relating to supposititious Births) have any Relation to that of the Prince of *Wales*. The first of these Cases, being between a Husband and his Wife after a Divorse: The second, of the Inheritance and Possession of an Estate, between the Relations of a dead Husband and the Wife, who Asserted her self with Child. But in the Case of the Prince of *Wales*, I think there was no Divorse; neither could there be any dispute of Inheritance in the business, when his Father, King *James*, was then alive; and consequently no such thing as Succession or Mission in the Possession of the Goods of him who was still living. For the Rule in Civil Law is, *Viventis nulla est hæreditas neque successio*, according to the 29. *Dig Tit*. 2. *L*. 19. *de Acquirenda vel omittenda hæreditate*. From all which I infer, That (supposing the Civil Law, which this Gentleman has been pleased to Quote, were indeed Common Law (upon which the true State of the Controversie alone depends) and more over in the great Charter of *England*) that King *James* was not obliged to such a Formality, neither of the Cases amounting, in the least, to have him concern'd in them. By the by, I cannot omit wondring, since this Gentleman seems to be so mightily taken (and I may well enough add so mightily mistaken) with Civil Law, he did not gratify the World with an Exposition of the Edict of the Emperors *Dioclesian* and *Maximinian Cod. Lib*. 9. *Tit*. 22. *L*. 10. *de partu supposito*.

Cum suppositi partus Crimen Patrui tui Uxori moveas, apud Rectorem Provinciæ, instituta Accusatione, id proba. So that from Civil Law it is not *any Cause of suspicion* will do the business, but proof must be made to render it sufficient——— *Actori Incumbit Onus probandi*. And so much for his Civil Law. With this likewise exactly agrees the *Basilicon*, Περὶ τ͂ θεορῆσαι τὴν γασέρα, *Lib*. 21. *Tit*.

In

In this buſineſs I have deſignedly waved giving you the Expoſition of [illegible]oſt Celebrated Civilians *Cujacius*, *Molinæus*, and *Faber*, upon theſe paſſages, I have had occaſion to quote, becauſe I was loth to have my Letter ſwell to a Volume. But if any curious Gentleman will take the pains to examine the Learned Works of the foremention'd Civilians, he will find their Expoſitions agreeable to what I have produced theſe Laws for.

I ſhall now briefly obſerve what I judge material to object to his old Common Law, and then take my leave of him and you for the preſent. I ſhall ſave both the Expence of Time and Paper, if I only deſire you to peruſe that Chapter in *Bracton*, to which his Margin does refer you; you'l find it chiefly concerns what the Civil Law, I mentioned before, provided for: And as for *Fleta* (who almoſt in every thing follows *Bracton*,) he ſays, *That ſuppoſing the Husband and Wife being Summoned by the King to appear before the Sheriffs, upon Complaint of the next Heir, that they have Forg'd and Suborn'd a ſuppoſititious Child.* To uſe his own Words. *Si potentes videbantur eſſe Parentes, ad Prolem ſuſcitandam pro hærede judicabitur niſi querens docere poſſit Contrarium. That if the Parents be thought able to get Children (their Child) ſhall be adjudged Heir, except the Plaintiff can prove the contrary.* Take Notice here what both *Bracton* and *Fleta* ſay, *That this Writ is to be Iſſued out by the King, &c.* Therefore granting this were now true Law (which I deny) yet I cannot perceive how it would reach the King. For who is ſo mad to ſuppoſe the King would iſſue out a Writ to his Officer, for the Examining the Queen, his Wife, with whoſe Iſſue he himſelf is well ſatisfied. His friend *Bracton* would have told him according to his *Old Law*, That if the King Rule indeed contrary to the Laws of the Land; that all that Subjects ought to do in the matter is to have recourſe to ſupplication (to uſe his Words,) *Cum Breve non currat contra ipſum.*) That he would correct his Error, which (ſays he) if he refuſes and denies to do, 'tis altogether ſufficient puniſhment for him, That he expect God a Revenger. For (as he goes on) no Man may preſume to call his Actions in Queſtion, much leſs riſe up againſt his Act. *Bracton. lib. 2. cap. 8. de acquirendo rerum Dominio, fol. 5.*

To end all, I'll tranſcribe you what our Oracle of the Law of *England* ſays in this matter. All, without difficulty, ſuppoſe, I mean my Lord *Cook*.

"For the Benefit and Safety of Right Heirs *contra partus ſuppoſitos*, the Law hath provided "Remedy by the Writ *de Ventre Inſpiciendo*, whereof the Rule in the Regiſter is this. *Nota. Si "quis habens Hæreditatem duxerit aliquam in Uxorem, & poſtea moriatur ille ſine Hærede de Corpore ſuo "Exeunte per quam Hæreditas illa Fratri ipſius defuncti deſcendere debeat; & Uxor dicit ſe eſſe pregnan- "tem de ipſo defuncto cum non ſit, habeat Frater & Hæres Breve de Ventre inſpiciendo.* It ſeemeth by "*Bracton* and *Fleta*, which followed him, that this Writ doth lie *ubi Uxor alicujus in vita Viri ſui "ſe pregnantem fecit cum non ſit ad Exhæreditationem veri Hæredis*, &c. *Ad querelam veri Hæredis per "præceptum Domini Regis*, &c. which is to be underſtood according to the Rule of the Regiſter: when a "Man having Lands in Fee-ſimple dieth, and his Wife ſoon after marrieth again, and feigns her "ſelf with Child by her former Husband: In this Caſe, though ſhe be married, the Writ *de "Ventre Inſpiciendo*, doth lie for the Heir. But if a Man ſeized of Lands in Fee (for Example) "hath Iſſue a Daughter, who is Heir Apparent; She in the Life of her Father cannot have this "Writ for divers Cauſes. Firſt, Becauſe She is not Heir, but Heir Apparent; for, as hath been "ſaid, *Nemo eſt Hæres Viventis*; and this Writ is given to the Heir to whom the Land is deſcended. "And both *Bracton* and *Fleta* ſay that this Writ lieth *ad querelam veri Hæredis*, which cannot be "in the Life of his Anceſtor, and herewith agreeth *Britton* and the Regiſter. Secondly, the ta- "king a Husband, in the Caſe aforeſaid, being her own Act, cannot barr the Heir of his lawful "Action

Regiſt. 227. Bracton. l. 2. f. 69. Britton. f. 165. Fleta. l. 1. c. 14.

" Action once reſted in him. Thirdly, the Law doth not give the Heir Apparent any Writ; for " 'tis not certain whether he ſhall be Heir *Solus Deus facit Hæredes.* Fourthly, the Inconveniences " were too great, if Heirs Apparent in the Life of their Anceſtors, ſhould have ſuch a Writ to " examine and try a Man's lawful Wife, in ſuch ſort as the Writ *de Ventre Inſpiciendo* doth appoint; " Or if She ſhould be found to be with Child, or ſuſpect; then She muſt be removed to a Caſtle, " and there ſafely kept until her Delivery; and ſo any Man's Wife might be taken from him " againſt the Laws of God and Man. So ſay my Lord Chief Juſtice *Coke. Inſtit. Part. I. lib.* 1. *cap.* 1. *lib.* 1. *fol.* 8.

You may now ſee what obliged our Anſwerer to run to his Civil and Old Common Law, the firſt being little practiſed in *England*, and neither that nor Old Common Law underſtood, but by the moſt eminent Profeſſors. But for the modern Expoſition of Laws, he ſuppoſed we were a little better verſed in. I hope ſome of our able Lawyers will take care to vindicate the Honour of their Profeſſion, and not ſuffer it to be thus abuſed by crafty People, to inſinuate Falſhood into, and poyſon the minds of the Ignorant and Unwary. For my own part, what I have here ſaid, is juſt what my Leiſure would ſuffer me haſtily to ſet down, and therefore wants thoſe Ornaments both of Method and Elegance I could wiſh it cloathed with; however, conſidering it an Epiſtle of one Friend to another, it carries, I hope, its Pardon along with it. Before I take my Farewel, I cannot omit ſaying ſomewhat to the grand popular Objection generally urged, *That it is not expected that the Birth of the Prince of* Wales *be proved Spurious, ſince a Negative will not admit of Proof.* To which I anſwer, That the aſſerting his Highneſs, the Prince of *Wales* not to be *K. J's* Son is an Affirmative. For ſuppoſe I aſſert *Titius* not to be the Son of *Cajus*, I affirm him to be the Son of Some-body elſe: So till the Prince of *Wales* be proved to be the Son of Some-body elſe than of *K. J--s*, I ſhould do a very great Injury to Equity and Common Juſtice (ſince his Father has own'd him) ſhould I pronounce him a Baſtard. Beſide, the Matter never came to Litigation or Diſpute; and to hang People before we judge 'em, has ever, I think, been deem'd and look'd upon as too ſevere and unjuſt. We ought, in an Affair of ſuch Moment, to be very wary and cautious how we proceed; ſince the Example, I fear, may be of direful and pernicious Conſequence. Encouraging you ſtill to be ſtedfaſt in the Truth, I take my Leave of you with theſe excellent Lines of *Horace*,

Juſtum & tenacem propoſiti Virum
Non Civium ardor prava Jubentium;
Non vultus inſtantis Tyranni,
Mente quatit ſolida.

I am, *Deareſt SIR,*

April 5. 1691.

Your moſt Faithful and Affectionate Friend

And Humble Servant.